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No. 06-1510

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SUPREME COURT OF U.S.

In the Supreme Court of the United States

WESTFALIA-SURGE, INC.,

Petitioner,

v.

MARIPOSA FARMS, LLC,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

CASES

Bitler v. A.O. Smith Corp., 391 F.3d 1114 (10th Cir.2004) 3,5, 6

Clausen v. M/V New Carissa, 339 F.3d 1049 (9th Cir. 2003) 4

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 1, 3, 4

Hardyman v. Norfolk & Western Ry. Co., 243 F.3d 255 (6th Cir. 2001) 5

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) 1, 3,6, 7

Westberry v. Gislaved Gummi AB, 178 F.3d 257 (4th Cir. 1999) 5

RULES

Rule 702 of the Federal Rules of Evidence 1

OTHER AUTHORITIES

Stedman's Medical Dictionary 474 (26th ed. 1995) 4

The Federal Judicial Center Reference Manual on Scientific Evidence 214 (1994) 5

INTRODUCTION

Mariposa in its brief in opposition to Westfalia's Petition for Writ of Certiorari urges denial of the Petition for the reasons that there is no federal question, no conflict and no question worthy of the Supreme Court's resolution.

To the contrary, preservation of this Court's directives in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) requires that the methodology of reasoning to the best inference be limited, lest it be allowed to swallow the principles established by *Daubert* and *Kumho*. All other Circuits have approved the methodology applied by the Tenth Circuit here *only* when applied in the medical context under the label of differential diagnosis.

There is presently a conflict between the Tenth Circuit and this Court. There is also a conflict between the Tenth Circuit and all other Circuits which have limited this approach to the medical context.

ARGUMENT

There is a Federal Question

Jurisdiction in both *Daubert* and *Kumho* was based on diversity of citizenship. *Daubert*, 509 U.S .at 589 held that Rule 702 of the Federal Rules of Evidence controlled in a federal trial. Hence, there can be no doubt that a federal question is presented.

Application Here of Reasoning to the Best Inference Conflicts with *Daubert/Kumho* and All Other Circuits Which Limit it to a Medical Context.

It is undisputed that the only reliable method of determining vacuum fluctuation within a milking system is through testing pursuant to protocols established by the American Society of Agricultural Engineers ("ASAE").

It is Mariposa's claim that vacuum fluctuation within the milking system designed by Westfalia caused damage to its cows.

It is undisputed that there is no evidence of test results demonstrating vacuum fluctuation within the Mariposa system.

Mariposa urges that the Tenth Circuit's "reasoning to the best inference" be allowed to substitute for ASAE testing.

When, as here, a reliable testing procedure is available and required by engineering protocol, there is no reasonable basis for substituting reasoning to the best inference for testing.

Both Dr. Reitsma, an agricultural engineer, and Dr. Corbett, a veterinarian, conceded that it was well accepted that the only method to determine if vacuum fluctuation is sufficient to cause mastitis is through ASAE testing.

Mariposa argues that reasoning to the best inference which is another name for differential diagnosis, is appropriate here because Dr. Corbett is a veterinarian and there should be no distinction between veterinarians and physicians. What Mariposa fails to mention is that Dr. Corbett is being relied upon for an engineering conclusion, not a veterinary medical conclusion. Prior to Dr. Reitsma's test results being stricken, Dr. Corbett declined to express an opinion on vacuum stability because it required testing for which he relied upon Dr. Reitsma.

The movement of air through a closed milking system involves principles of engineering, fluid dynamics and physics, not veterinary medicine.

The "diagnosis" of vacuum fluctuation is by means of an engineering test. It cannot be accomplished by differential diagnosis. Such an approach is contrary to *Kumho*. If this Court allows this case and *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114 (10th Cir.2004) to stand it is a good bet, at least in the Tenth Circuit, that *Kumho* will be emasculated.

In support of its argument that the Tenth Circuit appropriately applied "reasoning to the best inference" in this case, Mariposa cites nine cases in which the Second, Fourth, Sixth, Eighth, Ninth and Tenth Circuits accepted differential diagnosis by medical professionals as an accepted methodology under *Daubert/Kumho*. In each case the reference is to a methodology known as "differential diagnosis" and is limited to the medical context. Mariposa, however, fails to demonstrate why differential diagnosis should apply in analysis of an engineering question when a definitive testing methodology is available.

Daubert, 509 U.S. at 593-94, specifies one of the appropriate questions to be whether the hypothesis can be tested. Here a test was available but not used because of serious misconduct by Mariposa and its counsel. To allow substitution of an untested hypothesis for testing is to reward Mariposa for its misconduct.

Daubert, 509 U.S. at 590, points out that an inference must be derived through a scientific method. Can one reason to the best inference when he does not use the most reliable basis for reaching a conclusion i.e. an accepted test?

In one of the cases cited by Mariposa, *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1057 (9th Cir. 2003), the Court puts differential diagnosis in its proper context when it states:

> A whole sub-body of *Daubert* law has developed with respect to the reliability, and admissibility, of differential diagnosis. Differential diagnosis is "the determination of which of two or more diseases with similar symptoms is the one from which the patient is suffering, by a systematic comparison and contrasting of the clinical findings." Stedman's Medical Dictionary 474 (26th ed. 1995) (hereinafter "Stedman's"). As described by the Fourth Circuit,
>
> > Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated. A reliable differential diagnosis typically, though not invariably, is performed after "physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests," and generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of these

> potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is the most likely.
>
> *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999) (citation and internal quotations omitted). [emphasis added]

As noted in *Hardyman v. Norfolk & Western Ry. Co.*, 243 F.3d 255, 260 (6th Cir. 2001) the Federal Judicial Center Reference Manual on Scientific Evidence 214 (1994) provides that "differential diagnosis" is defined as "[t]he method by which a physician determines what disease process caused a patient's symptoms." The manual goes on to point out that "[t]he physician considers all relevant potential causes of the symptoms and then eliminates alternative causes based on a physical examination, clinical tests, and a thorough case history." [emphasis added]

In *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114,1123-24 (10th Cir. 2004), the case in which the Tenth Circuit adopted the "reasoning to the best inference" methodology, the Tenth Circuit recognized that, while other Circuits had applied differential diagnosis as an acceptable methodology, it was not clear that it was applicable outside the medical context.

The Tenth Circuit, after acknowledging that other Circuits had applied "differential diagnosis" methodology only in the medical context, adopted the methodology in an engineering case and said in that instance it was " a general method more aptly characterized as a process of reasoning to the best inference." *Bitler*, 391 F.3d at 1124.

The approach followed by the Tenth Circuit in *Bitler* and here can fairly be said to conflict with limitation of differential diagnosis to the medical context by all other Circuits and with *Daubert* and *Kumho*.

The District Court held that Dr. Reitsma's method of reaching a conclusion based upon an inspection of photographs and a discussion with the owner of the system was an inadequate methodology. Dr. Corbett did not even make a visual inspection. He merely said he had never seen mastitis spread this quickly without abnormally functioning milking equipment. How, then could Dr. Corbett's "reasoning to the best inference" be any more reliable than Dr. Reitsma's on an engineering question?

Kumho, 526 U.S. at 154, rejected a "general theory that, in the absence of evidence of abuse, a defect will normally have caused a tire's separation." It can fairly be stated that *Kumho* at 154-155 implicitly rejects "reasoning to the best inference" as a methodology appropriate in the field of engineering, particularly when a definitive testing methodology is available. Prior to trial Dr. Corbett conceded that ASAE testing was the standard for determining vacuum fluctuation in a milking system and that he was relying upon the testing done by Dr. Reitsma, which was excluded from evidence and from his consideration in reaching his conclusion that malfunctioning equipment injured Mariposa's cows.

There may be an inference that a bone is broken or that an intestine is perforated or that a condition is caused or not caused by infection. But why rely on an inference when a test would conclusively demonstrate whether the inference is correct? Here, to apply "reasoning to the best inference" is to allow an unsupported hypothesis to substitute for a conclusion based upon industry accepted testing.

CONCLUSION

It is respectfully submitted that now is the time to relegate "differential diagnosis" or "reasoning to the best inference" to its proper place in *Daubert/Kumho* law, the medical context.

This Court has twice addressed the limitations to be placed on expert testimony in a federal trial. Prevention of the erosion of the *Daubert/Kumho* principles is certainly worthy of this Court's attention.

Respectfully submitted ,

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